IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, et al. - - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - Respondents

(Other respondents named on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents in this case are Lyman Johnson, Richard Miller, Aaron Howard, John Schmidt, Earl Alluisi, John R. Hughes, Sarah White, Johnie Wright, Suzanne Post, Hazel K. Lane, American Federation of Teachers, Jefferson County Federation of Teachers, Local 672, and the Kentucky Human Relations Commission.

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TABLE OF AUTHORITIES

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No. _____

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - *Petitioner*

v.

JOHN E. HAYCRAFT, et al. - - *Respondents*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, L. J. Hollenbach, III, County Judge of Jefferson County, Kentucky, respectfully prays that a writ of certiorari issue to review the decision rendered in this case on March 11, 1977, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The order of the Court of Appeals for the Sixth Circuit herein sought to be reviewed was entered on March 11, 1977. That order affirms the Memorandum Opinion and Order and the Judgment of the United

States District Court, Western District of Kentucky, entered on May 18, 1976. All these aforesaid opinions and orders are unreported and are therefore reproduced in the Appendix attached hereto.

Earlier opinions and judgments of the courts in this case include the following: The original Memorandum Opinion and Judgment of the District Court holding that the school systems of Jefferson County were unitary were handed down by the District Court on March 8, 1973 in the consolidated class actions, *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky,* No. 7045 (W. D. Ky.) and *Haycraft* v. *Board of Education of Louisville, Kentucky,* No. 7291 (W. D. Ky.). These were reversed by the Sixth Circuit in *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925 (6th Cir., 1973).

Following these decisions there have been a number of other opinions and orders in this case not directly related to this petition, including actions by this Court. These include *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925 (6th Cir., 1973), vacated, 418 U. S. 918 (1974); *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 510 F. 2d 1358 (6th Cir., 1974); *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 510 F. 2d 1358 (6th Cir., 1974), *cert. den.,* 421 U. S. 937 (1975); *Newburg Area Council* v. *Gordon,* 521 F. 2d 578 (6th Cir., 1975); *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir., 1976);

and *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir., 1976), *cert. den.,* —— U. S. —— (1977), 97 S. Ct. 812, *rehearing den.,* —— U. S. —— (1977), 45 L. W. 3635.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on March 11, 1977. This petition for writ of certiorari was filed within ninety days of that order. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE QUESTION PRESENTED

The Sixth Circuit having found some incidences of state imposed segregation and having reversed the District Court decision that the school board was operating a unitary system, was the District Court thereafter required to remove the racial identifiability of every school in Jefferson County, so that the admission by Petitioner's expert that his desegregation plan would not accomplish this result necessitated its rejection and the dismissal of this Petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision relevant to issues in this case is Amendment XIV, Section 1, United States Constitution, which states:

> "No State shall . . . deny any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The consolidated class actions from which the present controversy arises were filed on August 27, 1971 and June 22, 1972. Those actions alleged that black students in the public school systems in Louisville and Jefferson County were unlawfully discriminated against in violation of the Fourteenth Amendment.

The District Court dismissed these complaints and commended the defendant school systems for their early compliance with this Court's decision in *Brown* v. *Board of Education of Topeka I*, 347 U. S. 483 (1954). This decision, however, was appealed by the plaintiffs, and on December 28, 1973, the Court of Appeals for the Sixth Circuit reversed the District Court. *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky*, 489 F. 2d 925 (6th Cir., 1973). It was the opinion of the Sixth Circuit that because the open transfer policy of the city school system was having a segregative effect and because the county school system had allowed the reconstruction of a predominantly all-black school following a fire in which it was destroyed, the city and county school systems had not eliminated all vestiges of state-imposed segregation. The Sixth Circuit also commented critically on the fact that many schools in the center city were identifiably "black." The Court then remanded the case to the District Court for formulation of a desegregation plan.

On July 30, 1975 the District Court entered its plan requiring that certain racial quotas be met in every

school in Jefferson County. These quotas varied from 12 to 40 percent black in the elementary schools and from 12½ to 35 percent black in the middle schools and high schools. In order to meet these racial quotas, substantial cross-county busing was required and was ordered by the District Court.

Because of the great dissatisfaction with the District Court's plan, on October 8, 1975, this Petitioner moved to intervene in this action. It was Petitioner's position that as the county's chief executive officer* elected by all the people of Jefferson County he was uniquely capable of offering alternative desegregation plans which would be more workable while at the same time fully restoring the plaintiffs to their constitutional rights. A hearing was held on this motion on December 12, 1975, and on December 22, 1975, the District Court allowed the Petitioner to intervene.

Pursuant to the further order of the District Court, on April 22, 1976, the Petitioner filed his alternative desegregation plan which had been designed by Dr. James S. Coleman,** a nationally known sociologist and professor at the University of Chicago.

The basic elements of Dr. Coleman's alternative desegregation plan*** were as follows: (1) those three

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*Although called a "County Judge," this office combines executive, legislative and judicial power under a single authority. In Jefferson County, however, the primary responsibilities of the County Judge are executive in nature.

**Dr. Coleman is the author of the "Coleman Report," a national study authorized by the Civil Rights Act of 1964 under the auspices of the United States Office of Education and completed in 1966. This study is often credited with having provided the sociological basis for requiring massive busing to achieve racial balance in American schools, a conclusion with which Dr. Coleman now strongly disagrees.

***This plan is contained in the appendix below to the Court of Appeals on pages 9-31.

county schools (i.e., Price, Cane Run and Newburg) which the Sixth Circuit found inappropriately located or districted, would be manditorily redistricted to reflect as closely as possible the racial makeup of the school system as a whole; (2) attendance zones at all other schools in the system were to be drawn so as to produce as much integration as possible on a neighborhood basis; (3) any child could transfer out of his neighborhood school to any other school in the system where such a transfer would have an integrative effect; (4) transfers would not be allowed where they tended to have a segregative effect*; (5) neighborhood school enrollments were to be limited in such a manner as to allow room for integrative transfers up to at least fifteen percent** of the school's enrollment; (6) principals of all schools would be encouraged to design and implement programs which would draw students of that race otherwise under-represented; (7) there would be established a number of traditional and other specialty schools (i.e., magnet schools) to encourage enrollment redistribution on an integrative basis and to upgrade the educational quality of the school system; and (8) all necessary transportation to implement this desegregation plan would be provided by the school system.

*The purpose of this transfer limitation was to correct that defect in the open transfer policy of the city system which the Sixth Circuit held to be unconstitutional. Thus, only integrative transfers would be permitted.

**On account of declining enrollment in the past two years, all blacks who wished to transfer away from schools which might otherwise be predominantly black could now be absorbed into schools which are predominantly white.

The hearings on this alternative desegregation plan began on May 3, 1976. Petitioner began the introduction of his proof on May 4, 1976. His first witness was Professor James S. Coleman, the originator of the plan. During the course of his cross-examination, Dr. Coleman was asked whether or not his plan would remove the racial identifiability of all the schools in Jefferson County.* In response to that question he stated that in his opinion neither his plan nor any other plan could successfully accomplish that result within the quota limitations which the court established.** Petitioner's counsel argued that the elimination of the racial identifiability of every school in the Jefferson County school system was not synonymous with the constitutional necessity of removing the vestiges of state imposed segregation and was not constitutionally required in the case at hand. But the District Court

*This question and the related discussion hereinafter summarized are contained in the appendix below to the Court of Appeals beginning on page 99.

**The wording of the District Court's Memorandum Opinion and Order appears to attribute to Dr. Coleman the statement that his plan would not "eliminate all remaining vestiges of state-imposed segregation in the Jefferson County school system." The reason for this is that the District Court views that phrase as being synonymous with "eliminating all racial identifiability from every school in the Jefferson County school system." Petitioner, however, believes that these two phrases are distinguishable. A "vestige of state imposed segregation" is necessarily the result of wrongful state action, while "racially identifiable schools" are not. In response to a question by the District Court, Dr. Coleman admitted that his plan could not eliminate the racial identifiability of every school. He did not, however, suggest that his plan would not eliminate "all vestiges of state-imposed segregation." On the contrary, Petitioner has steadfastly maintained that the Coleman plan will eliminate all vestiges of state imposed segregation and that it complies with all other constitutional requirements set forth by this Court.

disagreed. The concession by Dr. Coleman that his plan would not eliminate the racial identifiability of every school in Jefferson County, in the Court's opinion, required the dismissal of this Petitioner.

The District Court, therefore, ignored any further entreaty by this Petitioner that he be allowed to continue with the proof of his plan. The failure of the Coleman plan to assure some degree of racial balance in every school was fatal. Consequently, on May 18, 1976, the District Court entered both a Judgment (App., *infra,* p. 30) and a Memorandum Opinion and Order (App., *infra,* pp. 27-29) effecting such dismissal.

The Petitioner appealed the decision of the District Court. However, on March 11, 1977, upon motion of Thomas L. Hogan, counsel for certain Respondents, the Court of Appeals for the Sixth Circuit dismissed Petitioner's appeal prior to oral argument (App., *infra,* pp. 25-26). It is that decision of the Sixth Circuit which Petitioner now seeks to review by writ of certiorari from this Court.

The issue presented in this petition is quite simple and is as follows: Does the Constitution require the elimination of all racial identifiability (that is, does it require some racial balancing) in every school once there has been a finding of some state segregative action? The Petitioner believes that it does not.*

*The contrary view of the lower courts on this question might be best illustrated by the statements of the District Court made on May 3, 1976:

"And, if so, if such widens the bridge of racial identification, then it is my concern . . . If the widening of that

(Footnote continued on following page)

REASONS FOR GRANTING THE WRIT

I. The Rejection of the Coleman Plan for the Reasons Given by the Courts Below Conflicts With the Decisions of This Court.

Solely as a consequence of Dr. Coleman's testimony that his alternative desegregation plan would not eliminate all racially identifiable schools in Jefferson County, the Coleman plan was found to be constitutionally infirm by the lower courts.

Yet it has never been thought in this case that the racial imbalance in most of the system's racially identifiable schools was the result of state action. Indeed, in its original decision in this case, the District Court specifically held that the racial composition of these schools merely reflected the racial makeup of the neighborhoods in which those schools were located. This finding has remained undisturbed by the Court of Appeals.

Nevertheless, because of the conclusion that there had been some *de jure* segregation in Jefferson County, the courts below have concluded that no racially identifiable schools can now be tolerated. This conclusion clearly conflicts with the decisions of this Court. Contrary to the courts below, even in a system which has

(Footnote continued from preceding page)

bridge of identification is attempted to be excused . . . then that will be unacceptable. * * *

"And the determination of whether or not a school is predominantly black or predominantly white is a very simple one to me, and I drive by it, and I want to see how many black faces there are. That is all. I don't care about the rest of it. * * * That is the keystone." (See Transcript of Proceedings of May 3, 1976, contained in the appendix below to the Court of Appeals, pages 37-38.)

once practiced segregation by law, "the constitutional command to desegregate schools does not mean that every school . . . must always reflect the racial composition of the school system as a whole." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24 (1971).

As this Court further pointed out in *Swann, supra,* if the district court in that case had required any degree of racial mixing "as a matter of substantive constitutional right, that approach would be disapproved and we would be obliged to reverse." For the existence of "one race, or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann, supra,* 402 U. S. at 26.

What the Constitution requires and what the Coleman plan provides is that no person be effectively excluded from a school on account of his race or color. See *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969). What is really at stake is "the personal interests of the plaintiffs in admission to public schools as soon as possible on a non-discriminatory basis." *Brown* v. *Board of Education of Topeka II,* 349 U. S. 294, 300 (1954). Or as this Court stated in *Swann, supra,* 402 U. S. at 23:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly on account of race . . ."

At no time has it ever been suggested by Respondents that without the wrongful state action found to exist by the court below, all the schools in Jefferson County would now be balanced to a greater extent than that provided by the Coleman plan. The Petitioner has asserted, and it has not been disputed or denied by Respondents, that all the wrongful state actions are successfully corrected by the Coleman plan. Since "as with any equity case, the nature of the violation determines the scope of the remedy," *Swann, supra,* 402 U. S. at 15, the removal of the racial identifiability of every school in Jefferson County seems unnecessary under the facts of this case.

The Coleman plan was designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," *Milliken* v. *Bradley,* 418 U. S. 717, 746 (1974), and the conclusion of the lower courts that such action is constitutionally insufficient is patently at odds with the decisions of this Court. For as has been stated by Justice Powell under circumstances different from those in this case:

> "It is, indeed, a novel application of equitable power—not to mention a dubious extension of constitutional doctrine—to require so much greater degree of forced school integration that would have resulted from purely natural and neutral nonstate causes." *Keyes* v. *School District No. 1.* 413 U. S. 189, 249 (1973), Powell, J., partly concurring, partly dissenting."

This Court has long made it clear that even in a system which has once practiced segregation by law,

a school does not offend the Constitution simply because it is racially identifiable. Thus, in *Milliken* v. *Bradley, supra,* this Court specifically disallowed the use of an interdistrict remedy designed to remove the racial identifiability of both the urban and suburban schools in the Detroit area. Moreover, the Court reached this decision despite the undisputed conclusion of the district court that in the absence of including the suburban school district, "the racial composition of the student body was such, that the plan's implementation would clearly make the entire Detroit public school system *racially identifiable* leaving many of its schools 75 to 90 percent black." *Milliken, supra,* 418 U. S. at 1088. (Italics added.)

Other decisions of this Court also support the conclusion that a school does not offend the Constitution simply because it is racially identifiable. One such decision is *Pasadena City Board of Education* v. *Spangler,* —— U. S. ——, 96 S. Ct. 2697 (1976). For in *Pasadena* this Court held that once a unitary system was achieved and schools became racially identifiable only as a consequence of demographic factors, the district court could not thereafter eliminate such racial imbalances.

Thus, as interpreted by this Court, the Constitution does not require the elimination of all racially identifiable schools where such racial character is not the result of wrongful state action. What the Constitution prohibits, and what the Coleman plan will eliminate, is a "current condition of segregation resulting from intentional state action . . . ." *Washington* v. *Davis,*

426 U. S. 220, 96 S. Ct. 2040, 2048 (1976). State actions are not unconstitutional solely because they have a "racially disproportionate impact,"* *Washington* v. *Davis, supra,* 96 S. Ct. at 2047, but rather they must reflect a racially discriminatory purpose or intent:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause . . . ." *Washington* v. *Davis, supra,* 96 S. Ct. at 2048.

The principles of *Washington* v. *Davis* have twice recently been reaffirmed by this Court, once in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* —— U. S. ——, 97 S. Ct. 555 (1977), and also in *Austin Independent School District* v. *United States,* —— U. S. ——, 97 S. Ct. 517 (1976).

The concurring opinion of *Austin, supra,* probably contains the strongest language yet used by this Court in denying the necessity for eliminating all racially identifiable schools in a school system which once prac-

*In the absence of constitutional requirements or of other compelling factors of education or convenience unrelated to race, every child should be allowed (though not required) to attend the school nearest him. While admittedly this principle might leave some students in racially identifiable schools, so long as this homogeneity was not the result of state action taken to exclude students on the basis of their race or national origin, and especially where the students could themselves escape this result, such a state of affairs ought not to be considered an affront to the Constitution. See "In Uplifting, Get Underneath," by Nathan Glazer, published in *National Review* on October 15, 1976.

ticed segregation by law. In an opinion written by Justice Powell and concurred in by Justice Rehnquist and Chief Justice Burger, they severely criticized the effort of the lower court "to achieve a degree of racial balance in every school in Austin," *Austin, supra,* 97 S. Ct. at 518, and noted that such a remedy "appears to exceed that necessary to eliminate the effect of any official acts or omissions."

Commenting further on the limited nature of the violations found by the courts below and on the relationship of those violations to the remedy required, Justice Powell wrote:

> "The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was co-extensive with the constitutional violations, it adopted a view of constitutional obligations of a school board far exceeding anything required by this Court." *Austin, supra,* 97 S. Ct. at 519.

In further criticizing the lower court's opinion that earlier state segregative action now necessitated the elimination of all racially identifiable schools, Justice Powell stated:

> "I do not suggest that transportation of pupils is never a permissible means of implementing desegregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may

> not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children. A remedy simply is not equitable if it is disproportionate to the wrong." *Austin, supra,* 97 S. Ct. at 519.

Furthermore, in language reminiscent of the District Court's finding regarding Jefferson County, Justice Powell noted:

> "The principal cause of racial and ethnic imbalance in urban public schools across the country —North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns." *Austin, supra,* 97 S. Ct. at 519.

Under these circumstances, Justice Powell referred to the error made by the Court of Appeals for the Fifth Circuit. It was the same as that which has been made by the lower courts in the present instance:

> "Apparently misconceiving the import of the language in Green v. County School Board of New Kent County, 391 U. S. 430, 442 (1968), to the effect that there should be no 'Negro' school or

'white' school, the Court of Appeals seems to believe every school must be racially balanced to some degree. Green involved a rural, sparsely populated county with only two schools. Much of its language is irrelevant to a large urban school system. Moreover, the effect of applying the language of Green to such a system may be to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. The Solicitor General, speaking for the United States in this case, commented that 'there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action.' Brief for the United States, at 8 n. 5." *Austin, supra,* 97 S. Ct. at 518, fn. 2.

These decisions by this Court are clearly in conflict with the opinion of the courts below that because some *de jure* segregation was found in Jefferson County the racial identifiability of every school must be eliminated. Since it was this conclusion alone which caused the rejection of the Coleman plan, this petition for writ of certiorari should be granted to this Petitioner.

II. In Light of the Widespread Failure of Existing Desegregation Plans, the Advantages of the Coleman Plan in the Administration by Federal Courts Over School Desegregation Are So Important as to Merit a Hearing by the District Court.

The decisions below raise recurring problems of great moment in the administration by federal courts over school desegregation. Because of their widespread

scope, these problems and their solution are of national significance and importance.

Newspapers and magazines* reveal that in city after city, desegregation orders requiring system-wide elimination of racially identifiable schools result in white flight, declining educational achievement levels, financial difficulty arising from reduced enrollment, disillusionment of parents, diminished teacher morale, and decreased public support.

More and more sociologists, educators, legal scholars, and academicians are questioning the merits of attempting to eliminate all racially identifiable schools through plans involving some necessary degree of racial balancing. In an article entitled *Defining and Attaining Equal Educational Opportunity in a Pluralistic Society,* 26 Vanderbilt Law Review, page 461 (1973), at page 478, Dean Ernest Campbell observes that "the busing issue has acquired meanings that seem to have little relevance for the education of children in any direct sense."

Furthermore, after a ten-year study of a large-scale busing program in Riverside, California, Norman Miller and Harold B. Gerard concluded in an article entitled "How Busing Failed in Riverside", published in *Psychology Today* (June, 1976), that busing, even

*See, for example, *Busing: Integrationists Now Have Their Doubts,* N. Y. Times, June 22, 1975, Section E, page 16, column 1; *Rescinding a California Busing Order,* N. Y. Times, June 22, 1975, Section E, page 6, column 2; *School Integration Drive Eases in the South,* N. Y. Times, June 29, 1975, page 1, column 4; *Busing—The Arrogance of Power,* by Michael Novak, Wall Street Journal, July 25, 1975; *Freedom and the Busing Quagmire,* by George F. Will, Newsweek, July 12, 1976, page 76; and *A Black "Conservative" Dissents,* by Thomas Sowell, Courier-Journal Sunday Magazine, September 5, 1976, reprinted from N. Y. Times.

where voluntary, shows no positive changes in the achievement, motivation or personality of the black children involved. Similar conclusions have also been reached by others who have studied this field. See, for example, *School Desegregation Outcomes for Children,* by Nancy St. John (New York, John Wiley, 1975); and *Longitudinal Study of School Desegregation,* by David J. Armor and Robert Crain, published by The Rand Corporation.*

Ironically, even as regards the removal of racially identifiable schools, in the long-run massive busing plans often appear to have a counterproductive result. For example, in his avowal testimony given in this case on May 4, 1976, Dr. O. Z. Stephens, Director of Research and Planning for the Memphis City School System in Memphis, Tennessee, stated that since busing was begun in Memphis the school system has lost 44,000 whites, the loss of at least 35,000 of which can be directly attributed to white flight motivated by the desegregation orders of the federal courts. The result of this activity has been to convert the entire school system into a predominantly black racially identifiable entity. (Stephens, O.Z., Transcript of Testimony, May 4, 1976, pages 53, 55, 61.) Furthermore, in their testimony on the same day, David J. Armor, a Rand Corporation sociologist formerly with Harvard University, and Dr.

*See also "The Evidence on Busing", by David J. Armor, *The Public Interest* (Summer 1973), and comments of Dr. James S. Coleman in "Busing: A Great Debate", published in *Southern Journal* (Spring 1976), page 9. Also see *Inequality: A Reassessment of the Effect of Family and Schooling in America,* Jencks (1972); *Recent Trends in School Education,* Coleman, Kelly & Moore (mimeo. 1975); and testimony of Dr. Coleman on May 4, 1976 contained on page 62 in the appendix below to the Court of Appeals.

James S. Coleman, a University of Chicago sociologist, also stated that desegregation plans requiring massive busing in metropolitan areas have often produced white flight resulting in racially identifiable schools. (Armor, David J., Transcript of Testimony, May 4, 1976, page 36; and Coleman, James S., Transcript of Testimony, May 4, 1976, contained in the appendix below to the Court of Appeals on page 66.)

Blacks also are increasingly questioning the value of desegregation plans requiring substantial busing. In an article entitled *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* Yale Law Review, Volume 85, No. 4, March, 1976, at page 471, Harvard Law Professor Derrick A. Bell, Jr., himself a black, suggested that in their continued efforts to achieve racial balance in public schools civil rights lawyers may no longer actually be serving the best interests of the black children they are presumed to represent.

A much more severe criticism of this effort has been made by Thomas Sowell, a black scholar working at the Center for Advanced Study in Behavorial Sciences at Stanford University. In an article first printed in the New York Times and later reprinted in the Courier-Journal Sunday Magazine on September 5, 1976, Dr. Sowell wrote:

> "The prevailing liberal orthodoxy insists that busing is essential for black children to receive their constitutional rights—and they are to have their rights if it kills them . . .
>
> "The really crucial assumption behind involuntary busing is that some tangible benefit will result

—presumably to black children, but one would hope, to white children as well, and to the cause of racial understanding and mutual respect. The hard evidence does not support these assumptions."

Judges* also have recognized the often deleterious consequences of judicial attempts to eliminate racially identifiable schools. Thus, in his opinion in *Keyes, supra* (partly concurring and partly dissenting), Mr. Justice Powell states:

> "The single most disruptive element in education today is the widespread use of compulsory transportation especially at elementary grade levels. (413 U. S. at 253)
>
> "No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races. * * * Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools or divert attention from the paramount goal of quality in education to a perennially devisive debate over who is to be transported where." *Keyes, supra,* 413 U. S. at 250.

*Lower court judges also have severely criticized the doctrine which the lower courts have adopted in the instant case. For example, in a dissenting opinion in *Bronson* v. *Board of Education of the City School District of Cincinnati,* 525 F. 2d 344, 358 (6th Cir., 1975), Circuit Judge Weick stated:

> "In effect, what plaintiffs want is an 'equal but racially balanced' doctrine. * * * In my opinion, if such a doctrine ever became law, it would subject the people on a nationwide basis to taxation to pay for forced busing costing billions of dollars, which could be used more appropriately to improve the quality of education. It would polarize the races and irreparably harm all the good which has been accomplished in civil rights."

In removing *de jure* segregation from our schools, federal courts should not become unmindful of the public interest. Where two plans meet constitutional requirements, that which does not work should yield to that which does. As in other equity cases, in the framing of equitable remedies for school desegregation cases, the task is to balance the individual and collective interests involved. *Brown, supra,* 349 U. S. at 300.

Petitioner believes that there are many advantages to the Coleman plan which merit a hearing by the District Court. Moreover, assuming a determination in this case favorable to Petitioner, the District Court has indicated its willingness to hear the evidence regarding the Coleman alternative plan. For the reasons already suggested, therefore, the District Court should now be given that opportunity. The endeavor to seek the best possible solutions to the problems of school desegregation should be encouraged by this Court.

CONCLUSION

The issues raised herein call for adjudication by this Court for a number of fundamental reasons. To begin with, the decision of the courts below that the Constitution requires the removal of all racial identifiability (i.e., racial balancing) in every school in Jefferson County, regardless of the reasons for the initial imbalance, is patently inconsistent with the rulings of this Court. Furthermore, the possibilities raised by the Coleman plan itself are of nationwide importance and present a new and basic solution to the administration by the federal courts of the desegregation of the na-

tion's schools. As a consequence, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 1977, three copies of this Petition for Writ of Certiorari and attached Appendix were personally delivered to: Mr. Thomas L. Hogan, 701 W. Walnut Street, Louisville, Kentucky 40202; Mr. John A. Fulton, 1805 Kentucky Home Life Building, Louisville, Kentucky 40202; and to Mr. Henry A. Triplett, 231 South Fifth Street, Louisville, Kentucky 40202, said counsel representing the parties required to be served, and said service having conformed to the requirements of Rule 21(1) and Rule 33 of the Supreme Court Rules.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-2205

NEWBURG AREA COUNCIL, INC., ET AL. - *Plaintiff-Appellee*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - - - - - - *Defendant*

JOHN E. HAYCRAFT, ET AL. - - *Plaintiff-Appellee*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, ET AL. - - - - - - - - *Defendant*

I. J. HOLLENBACH, III - *Intervenor-Defendant-Appellant*

ORDER—Filed March 11, 1977

Before: PHILLIPS, Chief Judge, and PECK and ENGEL, Circuit Judges.

This matter has been submitted upon the motion of the appellees to dismiss this appeal under the provisions of Rule 8(b) and Rule 9, Rules of the Sixth Circuit, and upon the memoranda of counsel in support of and in opposition to said motion. In his memorandum in opposition to the motion, the intervenor-appellant states that he "agrees with this Court and the Supreme Court that the Constitution requires only the elimination of the vestiges of state imposed segregation," but he contends therein that "[t]he district court held that it must [eliminate the racial identifiability of *every* school in Jefferson County] as a conse-

quence of the mandate from this Court," whether or not the vestiges of segregation were state imposed. However, in the order from which this appeal was perfected, the district court specifically stated that our order "imposed on this Court [the duty] to eliminate all vestiges of *state-imposed segregation* in the Jefferson County Schools." (Emphasis supplied.) It thus clearly appearing that the District Court properly understood and applied the mandate of this court, it is manifest that the questions on which the decision of this court depends are so unsubstantial as not to need further argument (Rule 8(b), Rules of the Sixth Circuit), and accordingly,

IT IS ORDERED that the motion be and it hereby is granted, and it is further ORDERED that this appeal be and it hereby is dismissed.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN,
Clerk of Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NEWBURG AREA COUNCIL, INC., et al., - - *Plaintiffs*

v. **Civil Action No. 7045**

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al., - - - - - - *Defendants*

JOHN E. HAYCRAFT, et al., - - - - *Plaintiffs*

v. **Civil Action No. 7291**

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al., - - - - - - *Defendants*

MEMORANDUM OPINION AND ORDER—
Entered May 18, 1976

On May 4, 1976 testimony was heard concerning an alternative plan to the Court's desegregation order announced on July 30, 1975. The alternative plan was the product of the intervenor, L. J. Hollenbach, III, his staff and his experts. In brief the intervenor's plan centered on the current sociological beliefs of James S. Coleman, Professor of Sociology at the University of Chicago, the intervenor's lead witness.

After Professor Coleman had testified for some time the Court asked him whether he believed the proposed alternative plan would eliminate all remaining vestiges of state-imposed segregation in the Jefferson County school system. The witness answered it would not; yet, subsequently opined that no desegregation plan would eliminate racial identification in all schools in Jefferson County.

The Court is firmly convinced that such a concession by Professor Coleman requires the dismissal of the intervenor Hollenbach as a party to this lawsuit. Although the Court notes with interest that Professor Coleman does not believe that all remaining vestiges of state-imposed segregation can be eliminated from the Jefferson County school system, such an opinion, even from an expert, is not binding on this Court. Significantly, and it must be understood by all, this Court is under *a duty* to eliminate all remaining vestiges of state-imposed segregation in the Jefferson County schools. *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (6th Cir. 1974). *See also Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975). Neither Professor Coleman nor counsel for the intervenor Hollenbach fully understood that point.

Equal protection for all citizens is required by the Fourteenth Amendment to the United States Constitution. In the mainstream of human conduct such a task will be difficult, and maybe impossible, to achieve. However, the mere fact that the task is onerous does not mean we should abrogate our duty to strive toward that end. Similarly, the order imposed on this Court to eliminate all vestiges of state-imposed segregation in the Jefferson County schools is a very heavy one. However, it is a task which the Court believes can be accomplished if a determined and sustained effort is made. Alternative plans, such as the intervenor Hollenbach's, which are self-proclaimed failures, at least insofar as the Court's orders from the Sixth Circuit Court of Appeals are concerned, cannot be accepted as viable alternatives to the July 30, 1975 desegregation order.

WHEREFORE, FOR THE FOREGOING REASONS, it is hereby ORDERED that the intervenor Hollenbach shall be, and the same is hereby, dismissed as a litigant in this action,

And, there being no just reason for delay, the Clerk of the Court is directed to enter a final and appealable judg-

ment from this order dismissing the intervenor Hollenbach as a litigant in this action.

May 18, 1976

(s) JAMES F. GORDON
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
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JUDGMENT—Entered May 18, 1976

For all the reasons stated in the Memorandum Opinion of this day, the Court hereby making an express determination that there is no just reason for delay and the Court hereby making an express direction for the entry of this final judgment,

IT IS HEREBY ORDERED AND ADJUDGED that the intervenor L. J. Hollenbach, III, be, and he is hereby, dismissed as a litigant in this action.

May 18, 1976

(s) JAMES F. GORDON
Senior United States District Judge

Copies to:
Counsel of record